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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 707

PAUL F. BEITER,

Petitioner,

vs.

CHARLES ERB and
LOUIS FRANKEL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Now come Charles Erb and Louis Frankel, respondents herein, by Hector A. Brouillet and Mark H. Ellis, their attorneys in this behalf, and for answer to the petition for writ of certiorari heretofore filed herein, say:

PRELIMINARY STATEMENT.

While we believe the statement of facts as made by the Court of Appeals in its opinion correctly states the facts, the statement of facts as made by petitioner is incomplete and misleading. Therefore, we make a summary restatement of the facts.

SUMMARY RE-STATEMENT OF THE FACTS AND ISSUES.

Petitioner, a resident of the State of Wisconsin, instituted this action against Charles Erb and Louis Frankel, residents of the State of Illinois, for the recovery of damages to his person and property sustained as the result of the alleged negligent conduct of the respondents.

The amended complaint under which this case was tried in substance alleges that on the 19th day of August, 1954, the plaintiff, while in the exercise of due care for the safety of his own person and property, was driving his automobile upon Highway 20, in McHenry County, Illinois, and the defendants negligently allowed a cow to be at large upon said highway, and that as a consequence of the negligence of the defendants in violating Chapter 8, Section 1 of the Illinois Statutes, the automobile of the plaintiff collided with a cow of the defendants, and as a result of the negligence of the defendants, the plaintiff sustained damages to his person and property.

The answer filed by the defendants did not contest the jurisdiction of the court but contained a general denial of the other allegations of the amended complaint and affirmatively alleged that the plaintiff was guilty of contributory negligence and that the injuries and damages of plaintiff were not caused through any negligence of the defendants. The case was submitted to the jury and the jury returned a verdict of not guilty.

Petitioner appealed the case to the United States Court of Appeals for the Seventh Circuit upon the issue that the trial court was in error in giving an instruction on contributory negligence. His petition for writ of certiorari is based entirely on the proposition that the United States Court of Appeals committed error in holding that contributory negligence was a defense to this action.

ARGUMENT.

Petitioner contends that his action is a statutory action because Chapter 8, Section 1 of the Illinois Statutes is involved. He seems to think that this Statute creates a new cause of action as he claims that his action is brought under this statute.

Chapter 8, Section 1 of the Illinois Statutes does not create a cause of action. It merely defines or prescribes a duty of the owner or keeper of such animals. The action filed by petitioner herein is a common law action for damages resulting from the alleged negligence of the respondents for a violation of a statutory duty. This statute specifically provides that the owner or keeper of such animals shall not be liable in damages in any civil action for injury to the person or property of another caused by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large.

Petitioner did not allege or prove that a cow of the respondents was running at large with the knowledge of the respondents. His action was based upon the proposition that the respondents failed to use reasonable care in restraining their cattle from running at large by maintaining a proper fence.

The amended complaint filed by petitioner clearly states a common law action of negligence, based upon a violation of a statutory duty. The common law has always recognized the right to maintain an action for damages for personal injury and property damages sustained by the negligent conduct of another. The courts of Illinois

have always held that in an action for damages sustained by the negligent conduct of another, that before the plaintiff can recover in such an action, he must allege and prove that he was not guilty of any negligent conduct which contributed to his injury or damage. *Illinois Central R. R. Co.* v. *Oswald*, 338 Ill. 270; *Dee* v. *City of Peru*, 343 Ill. 36.

Petitioner has based his entire argument on the case of *Rost* v. *Noble*, 316 Ill. 357. We fail to see how this case has any bearing on the issue herein. The court held in that case the Child Labor Act gave a right of action, and negligence was not a question in such an action, and therefore contributory negligence was not a defense. In that case at page 312 the court states:

> "The common law has always given the right to maintain an action for a personal injury caused by the negligent act of another. The negligence of the plaintiff which contributed to the injury was a defense to such action. * * * These rules have no application to the present action which is not one for negligence."

The Supreme Court of Illinois has not had occasion to pass upon a case in which Chapter 8, Section 1 of the Illinois Statutes was involved since the proviso was added in 1931, but the Appellate Courts of Illinois have passed upon it on several occasions, and have held or recognized that contributory negligence was a defense to the action. *Farrell* v. *Crawford*, 222 Ill. App. 499; *Donadue* v. *Fraiken*, 200 Ill. App. 339; *Fugett* v. *Murray*, 311 Ill. App. 323; *Guffey* v. *Gale*, 332 Ill. App. 207; *Guay* v. *Neel*, 340 Ill. App. 111.

In the case of *Fugett* v. *Murray*, 311 Ill. App. 323 at page 333 the court states:

> "It is also contended by the defendant that the plaintiff, Mae Fugett, did not prove that she was in the exercise of due care for her own personal safety. The evidence shows that Mae Fugett was a passenger on the motorcycle at the time of the accident, and the negligence, if any, of her husband, who was operating it, cannot be imputed to her."

In *Guffey* v. *Gale*, 332 Ill. App. 207 the plaintiff, Guffey, was a passenger in a truck driven by Lindroth, which struck a pig of the defendant. The jury returned a verdict for the plaintiff and the defendant contested the case upon the theory that the plaintiff was guilty of contributory negligence. At page 216 the court states:

> "It is true that the court instructed the jury that the plaintiff, Guffey, was required to prove by a preponderance of the evidence that before and at the time of the accident, he was in the exercise of ordinary care for his own personal safety, and that if he failed to exercise such care, which contributed to the cause of the accident, he could not recover. * * * The question of the contributory negligence of the plaintiff, Guffey, was not fairly left to the determination of the jury under the rulings and instruction of the court on the admissibility of evidence and on objections to the argument of defendant's counsel."

Since, the courts of Illinois have consistently recognized that an action such as the one filed by the petitioner herein, is an action based upon negligence, and that contributory negligence is a defense to the action, we submit that the decision of the trial court and the Court of Appeals should be affirmed.

CONCLUSION.

We believe we have demonstrated that both the trial court and the Court of Appeals reached the correct decision. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

HECTOR A. BROUILLET,
Attorney for Respondents.

MARK H. ELLIS,
Of Counsel.